Supreme Court, U.S.
FILED
AUG 29 2000
CLERK

(2)

No. 00-169

IN THE

Supreme Court of the United States

MARVIN DAVIS,

Petitioner,

v.

FLORIDA POWER & LIGHT CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals erred in holding that, under the Americans With Disabilities Act, Petitioner's requested accommodations of no or selective overtime work contravened the seniority provisions of his union's collective bargaining agreement and were, therefore, unreasonable accommodations as a matter of law.

LIST OF ALL PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In addition to the parties listed in the caption, Respondent advises the Court that it is the wholly-owned subsidiary of FPL Group, Inc. The only shareholder of FPL Group, Inc. which owns more than a ten percent (10%) stake is Fidelity Management Trust Co., which is the Trustee of FPL Group's Employee Thrift Plans.

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RESTATEMENT OF THE CASE

Respondent (hereinafter also referred to as "FPL") adopts and incorporates by reference the facts set forth in the Opinion of the United States Eleventh Circuit Court of Appeals (Appendix A to the Petition, pp. 2a-5a) as a more complete and precise statement of the case than that offered by Petitioner.

Pursuant to Supreme Court Rule 15, which places an affirmative duty upon Respondent to "address any perceived misstatements of fact or law set forth in the petition that bears on what issues properly would be before the Court if certiorari were granted," FPL points out the following misstatements set forth in the petition:

Petitioner (hereinafter "Davis") states that his Statement of the Case is derived from the Opinion of the United States Court of Appeals for the Eleventh Circuit. Davis further states that "[m]any of FPL's jobs require employees to *sometimes* work overtime (App. 2a)." Petition, p. 4. However, the Eleventh Circuit's opinion actually states that "[o]vertime was *required* at FPL due to the nature of its electric utility business, including the need to maintain a steady flow of power, to remedy power outages, and to reconnect power quickly to its customers." Appendix A, p. 2a. With regard to Davis' specific job, the court noted that employees in that position "work the third highest number of overtime hours of some forty different FPL jobs, although almost all jobs require some overtime." Appendix A, p. 4a.

Davis also states that the Eleventh Circuit Court of Appeals affirmed the district court's holding that Davis' requested accommodations (no overtime or selective

overtime work) contravened the seniority provisions of his union's collective bargaining agreement and were unreasonable accommodations as a matter of law. Petition, p. 7. However, this was not the Eleventh Circuit's only holding. In its opinion, the Eleventh Circuit noted that Davis failed to establish a prima facie case of discrimination for two reasons. Appendix A, p. 2a. First, Davis failed to establish that he was a qualified individual with a disability "because he could not work the overtime FPL required." *Id.* The unreasonable nature of Davis' suggested accommodations was the second reason Davis failed to establish a prima facie case, not the only reason, as implied in Davis' Statement of the Case.

REASONS FOR DENYING THE WRIT

A. The Petition for a Writ of Certiorari Should be Denied Because Granting the Petition Would Be Futile.

Review of the issue urged by Davis would be an exercise in futility because FPL would nevertheless prevail on the alternative issue decided below. The Eleventh Circuit Court of Appeals affirmed the district court's determination that Davis failed to establish a prima facie case of disability discrimination for two reasons. Specifically, the court held that Davis was not a "qualified individual" with a disability within the meaning of the Americans with Disabilities Act (hereinafter "ADA") because he could not work overtime, which was an essential function of his position. Appendix A, p. 2a. Second, the court held that Davis' requested accommodations of no overtime or selective overtime work contravened the seniority provisions of his union's collective bargaining agreement and were, therefore, unreasonable accommodations as a matter of law. *Id.* Davis,

however, seeks review of only the second of those reasons. Because the Eleventh Circuit's finding that he failed to establish that he was an otherwise qualified individual with a disability is unchallenged, and because that finding was reason enough to find that Davis had failed to establish even a prima facie case of discrimination, there is no need for this Court to review the second reason, as urged by Davis.

In order to state a prima facie case of disability discrimination, Davis had to establish that: (1) he has a disability; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1525 (11th Cir. 1997). A "qualified individual" is one who "with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Eleventh Circuit agreed with the district court's finding that overtime was an essential function of Davis' position. Appendix A, p. 11a. Davis does not dispute this finding in his Petition. Below, Davis maintained that he could not work overtime and demanded that FPL either guarantee him no overtime or allow him to decide on a daily basis at the end of his shift whether he felt he could work overtime. Appendix A, p. 5a. The Eleventh Circuit, therefore, concluded that "Davis was not a qualified individual protected by the ADA because he could not work the overtime FPL required." Appendix A, p. 2a. *See also Bradley v. Univ. of Texas M.D. Anderson Cancer Center*, 3 F.3d 922, 925 (5th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994) (ADA does not require employer to eliminate or reallocate essential functions of position in order to accommodate employee). Therefore, even if this Court decided to review and reverse the Eleventh Circuit's holding that the requested

accommodations were unreasonable as a matter of law, that ruling would not affect the ultimate outcome of this case. Davis would still have failed to establish that he was a "qualified individual," a necessary element of his prima facie case of disability discrimination.

B. The Lower Courts Did Not Depart From This Court's Precedent and Correctly Decided This Case.

Davis argues that his petition should be granted because the Eleventh Circuit's opinion allegedly conflicts with this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). However, the alleged conflict is illusory. In *Hardison*, an employee sought relief from Saturday work duties for religious reasons. Deciding that case under the provisions of Title VII of the Civil Rights Act of 1964, this Court held that, without a clear and express indication from Congress, an agreed-upon seniority system need not give way to accommodate religious observances. *See Hardison*, 432 U.S. at 84. Davis argues that Congress intended a different result under the ADA. In this regard, he asserts that, based upon the legislative history of the ADA, collective bargaining agreements were not intended to "trump" reasonable accommodation claims as a matter of law, but are to be considered relevant in determining whether a given accommodation is reasonable. Petition, p. 9.

However, the ADA itself does not decisively answer the question of conflicts between the ADA and collectively-bargained seniority systems. The Seventh Circuit Court of Appeals was one of the first appellate courts to explore the issue. In *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997), the court held that the request of an epileptic railyard master for special

job placement and protection from "bumping," in violation of a collectively bargained seniority system, was unreasonable under the ADA as a matter of law. *Id.* at 1051. The Seventh Circuit reasoned that collectively-bargained seniority systems had a "special status in the law" that pre-existed the passage of the ADA. *Id.* at 1052. After reviewing the text of the ADA and its legislative history, the court concluded that "Congress to date [had] shown no intent to alter this status by the duties created under the ADA." *Id.* at 1051. Significantly, this Court denied certiorari in the *Eckles* case.

The Eleventh Circuit agreed with the Seventh Circuit's reasoning in *Eckles* and joined eight other circuits that have likewise held that an accommodation that contravenes the seniority rights of other employees under a collective bargaining agreement is unreasonable as a matter of law. Appendix A, pp. 11a-12a. Thus, the plain language of the ADA and the weight of the case law support the Eleventh Circuit's conclusion.

Further, the Eleventh Circuit's decision is not in conflict with this Court's decision in *Hardison*, as Davis suggests. This Court in *Hardison* addressed Title VII of the Civil Rights Act of 1964 in relation to an employer's obligation to accommodate an employee's religious observances. In contrast, the Eleventh Circuit in this case addressed an employer's obligation to accommodate an employee's alleged disability under the ADA. These two completely different statutes have different purposes and separate legislative histories. Therefore, Davis' argument that the Eleventh Circuit's decision is in conflict with this Court's decision in *Hardison* is without merit.

Hardison requires clear and express congressional intent before a court can find that agreed-upon seniority rights must give way to accommodation of religious observances. 432 U.S. at 79. No such expression of intent is found in the ADA. Despite Davis' conclusory assertions to the contrary, the ADA itself does not contain such an expression. Instead, Davis points to 42 U.S.C. § 12112(b)(2). However, that provision merely explains that discrimination includes an employer's participation in a contractual agreement (such as a collective bargaining agreement) that has the effect of discriminating against a qualified individual with a disability. *See* 42 U.S.C. § 12112(b)(2).

That provision is not applicable here. First, Davis was not a qualified individual with a disability. Second, Davis never alleged (nor could he) that FPL's collective bargaining agreement had the effect of discriminating against qualified individuals with disabilities. The statutory language cited by Davis simply falls far short of the "clear and express intent" required by *Hardison*.

Neither does the ADA's legislative history satisfy the *Hardison* standard. At best, the portions of the legislative history relied upon by Davis *suggest* that employers bargain with unions to reach accommodations. Petition, p. 9. Again, this falls far short of a "clear expression of congressional intent" to have collectively bargained seniority rights give way to the ADA's reasonable accommodation requirement.

Curiously, in making this argument, Davis ignores the facts of his case. FPL and the union did bargain over an accommodation for Davis. They agreed to suspend the overtime provisions for 60 days. Davis rejected this and other offered accommodations. Appendix A, p. 5a.

Cf. 29 C.F.R. § 1630.9(d) ("if an individual rejects a reasonable accommodation . . . that is necessary to enable the individual to perform the essential functions of the position . . . the individual will not be considered a qualified individual with a disability").

In addition, Davis argues that the Eleventh Circuit should have adopted the "balancing approach" advocated by the Equal Employment Opportunity Commission ("EEOC") in its Enforcement Guidance: "Reasonable Accommodation and Undue Hardship Under the ADA," 3 EEOC Compliance Manual (BNA) N:2465. This Guidance was issued *after* a substantial number of circuit courts had already decided the issue. Accordingly, the Eleventh Circuit correctly found that the "Policy Guidance is inconsistent with the ADA statute as construed by the courts before the EEOC issued its Policy Guidance." Appendix A, p. 13a.

CONCLUSION

Granting the petition in this case would be futile because FPL would nevertheless prevail on the alternative issue decided below. Even assuming this Court reversed the Eleventh Circuit's holding that Davis' proposed accommodations were unreasonable, Davis would still not prevail because he is not a "qualified individual" with a disability. In addition, the district court and the Eleventh Circuit properly determined that, under the plain language of the ADA and weight of the case law, an employee's proposed accommodation under the ADA is unreasonable if it conflicts with a bona fide seniority system established under a collective bargaining agreement. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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